QUESTION PRESENTED

Whether a United States district court lacks jurisdiction to entertain actions against the United States to quiet title to property by removing federal tax liens and to enjoin the government from collecting the specific tax on which the lien is based.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 7–10.

STATEMENT

Petitioners sued the United States in the United States District Court for the District of Vermont to quiet title to their property by removing a federal tax lien and to enjoin the collection of the taxes on which the tax lien was based (R. 1, 4–5). They alleged in their complaint that in 1964 and thereafter certain foreign royalty income, treated as capital gains by the Internal Revenue Service during the taxable years 1958 through 1963, had been classified differently by the Service, namely, as "normal" (ordinary) income (Pet. App. 14; R. 5, 136). Petitioners charged in their complaint that there existed no basis in law or in fact which justified the change in treatment (Pet. App. 14; R. 5, 136). Petitioners also alleged in their complaint that certain foreign travel expenses were improperly disallowed as ordinary and necessary business expenses (R. 5).

The government moved to dismiss petitioners' action (R. 1, 7), asserting (1) that the United States was immune from this suit; and (2) that petitioners' complaint failed to state a claim upon which relief

could be granted (R. 8–11). After several hearings had been held and supporting memoranda had been submitted (R. 2a–3a), the district court concluded that it lacked jurisdiction over the taxpayers' action by reason of the government's sovereign immunity, and granted the government's motion to dismiss (Pet. App. 14–17; R. 136–139). On appeal, the Second Circuit affirmed from the bench (Pet. App. 13).

ARGUMENT

The decision below is correct. There is no conflict or any other reason for further review.

1. In bringing this suit to quiet title and to enjoin further collection of taxes, petitioners rely on 28 U.S.C. 2410 (*infra,* pp. 7–10), which in terms expresses the United States' consent to be sued "in any civil action * * * to quiet title to * * * real * * * property on which the United States has or claims a mortgage or other lien." It is clear, however, that a taxpayer's action for a judicial determination of his tax liability is limited to suits for refund initiated in the district court or in the Court of Claims, or to proceedings in the United States Tax Court initiated by a petition for redetermination. *Flora* v. *United States,* 362 U.S. 145; *Phillips* v. *Commissioner,* 283 U.S. 589. Suits to enjoin the assessment and collection of federal taxes are prohibited by 26 U.S.C. 7421(a) (*infra,* p. 7), and no declaratory judgment is available to determine federal tax liability, 28 U.S.C. 2201 (*infra,* p. 7). Petitioners' necessary contention is that Section 2410 creates an exception to these well-settled rules in

every case where an unpaid tax liability matures into a federal tax lien.

As the district court recognized in its opinion, Pet. App. 15–16, this proposition was decisively rejected in *Falik* v. *United States,* 343 F. 2d 38 (C.A. 2). Nothing in the terms of Section 2410 or in its legislative history suggests that Congress was authorizing a new or alternative remedy to all taxpayers owning real and personal property. The provision was intended to provide relief only to third persons claiming an interest in property belonging to a taxpayer. *United States* v. *Brosnan,* 363 U.S. 237, 242–250; H. Rep. No. 95, 71st Cong., 2d Sess., pp. 1–2; S. Rep. No. 351, 71st Cong., 2d Sess., pp. 1–3; H. Conf. Rep. No. 2722, 71st Cong., 3d Sess., p. 3. Even as to third persons, the issue permitted for adjudication is only the formal validity or priority of the lien, and not the underlying tax liability. *Falik, supra,* 343 F. 2d at 41–42. There is no substantial contrary authority.

2. By their suit, petitioners seek to have their tax liability adjudicated, not to question the validity of the lien as such. Their complaint alleged (R. 4–5) the invalidity of the assessment and consequently of the lien. They again challenge the tax in their petition to this Court (Pet. 7–8). To the extent that they ask for a judgment of nonliability for the underlying tax, they seek relief by a declaratory judgment on federal taxes which is expressly barred by statute. 28 U.S.C. 2201; *Flora* v. *United States, supra.* To the extent the filing of this suit renders the property unmarketable by encumbering it with litigation risks, see *Arndt*

v. *Griggs*, 134 U.S. 316, 325, the suit is in essence one to enjoin the collection of taxes, prohibited by Section 7421(a).

3. The government's motion to dismiss and memorandum in support of that motion did not, as petitioners suggest (Pet. 3), include matters outside the scope of their complaint. The government's motion and memorandum referred only to matters which appeared in the complaint (R. 5) or were judicially known to the court. It was properly treated as a motion to dismiss.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1971.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7421 [as amended by Sec. 110(c), Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125]. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) TAX.—Except as provided in sections 6212 (a) and (c), 6213 (a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court * * *.

* * * * *

28 U.S.C.:

§ 2201. *Creation of remedy.*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2410 [as amended by Sec. 201 of the Federal Tax Lien Act of 1966, *supra*]. ***Actions affecting property on which United States has lien.***

(a) Under the conditions prescribed in this section and section 1444 of this title for the pro-

tection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter—

(1) to quiet title to,

(2) to foreclose a mortgage or other lien upon,

(3) to partition,

(4) to condemn, or

(5) of interpleader or in the nature of interpleader with respect to,

real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint or pleading shall set forth with particularity the nature of the interest or lien of the United States. In actions or suits involving liens arising under the internal revenue laws, the complaint or pleading shall include the name and address of the taxpayer whose liability created the lien and, if a notice of the tax lien was filed, the identity of the internal revenue office which filed the notice, and the date and place such notice of lien was filed. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such

service or such further time as the court may allow.

(c) A judgment or decree in such action or suit shall have the same effect respecting the discharge of the property from the mortgage or other lien held by the United States as may be provided with respect to such matters by the local law of the place where the court is situated. However, an action to foreclose a mortgage or other lien, naming the United States as a party under this section, must seek judicial sale. A sale to satisfy a lien inferior to one of the United States shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem, except that with respect to a lien arising under the internal revenue laws the period shall be 120 days or the period allowable for redemption under State law, whichever is longer, and in any case in which, under the provisions of section 505 of the Housing Act of 1950, as amended (12 U.S.C. 1701k), and subsection (d) of section 1820 of title 38 of the United States Code, the right to redeem does not arise, there shall be no right of redemption. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head (or his delegate) of the department or agency of the United States which has charge of the administration of the laws in respect to which the claim of the United States arises.

(d) In any case in which the United States redeems real property under this section or section 7425 of the Internal Revenue Code of 1954, the amount to be paid for such property shall be the sum of—

(1) the actual amount paid by the purchaser at such sale (which, in the case of a purchaser who is the holder of the lien being foreclosed, shall include the amount of the obligation secured by such lien to the extent satisfied by reason of such sale),

(2) interest on the amount paid (as determined under paragraph (1)) at 6 percent per annum from the date of such sale, and

(3) the amount (if any) equal to the excess of (A) the expenses necessarily incurred in connection with such property, over (B) the income from such property plus (to the extent such property is used by the purchaser) a reasonable rental value of such property.

(e) [28 U.S.C. (Supp. V)] Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who may issue a certificate releasing the property from such lien.

U.S. GOVERNMENT PRINTING OFFICE: 1971